

96-7151  
NUMBER \_\_\_\_\_

2

**ORIGINAL**

---

IN THE  
SUPREME COURT OF THE UNITED STATES

---

October Term, 1996

---

DEBRA FAYE LEWIS,  
Petitioner

versus

UNITED STATES OF AMERICA,  
Respondent

---

ON PETITION FOR A WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

---

PETITION FOR WRIT OF CERTIORARI

---

FRANK GRANGER  
A PROFESSIONAL LAW CORPORATION  
203 West Clarence Street  
Lake Charles, Louisiana 70601  
Telephone: (318) 439-2732  
Fax: (318) 439-1655  
Federal ID No. 06219

65 pp

## QUESTIONS PRESENTED

CAN THE COURT OF APPEALS ENTER A JUDGMENT OF CONVICTION UNDER AN "ANALOGOUS" FEDERAL STATUTE IN LIEU OF THE CONVICTION UNDER AN IMPROPERLY ASSIMILATED STATE STATUTE AT TRIAL, WHEN DOING SO IS NOT HARMLESS ERROR AND CAUSES SUBSTANTIAL PREJUDICE TO THE DEFENDANT'S RIGHTS?

CAN THE COURT OF APPEALS REFUSE TO APPLY THE MANDATORY SENTENCING GUIDELINES TO DEFENDANT'S CONVICTION ON THE ANALOGOUS FEDERAL SECOND DEGREE MURDER STATUTE AND IMPOSE A SENTENCE ON THE DEFENDANT THAT EXCEEDS THE MAXIMUM SENTENCING GUIDELINE RANGE?

## TABLE OF CONTENTS

QUESTIONS PRESENTED	i
TABLE OF CONTENTS	ii-iii
TABLE OF AUTHORITIES	iii-iv
OPINIONS BELOW	1
JURISDICTION	2
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	2-4
STATEMENT OF THE CASE	4-6
A. Course of Proceedings and Disposition Below	6-7
B. Statement of the Fact	8-9
REASONS FOR GRANTING THE WRIT	
Can the Court of Appeals enter a judgment of conviction under an "analogous" federal statute in lieu of the conviction under an improperly assimilated state statute at trial, when doing so is not harmless error and causes substantial prejudice to the defendant's rights?	9-14
Can the Court of Appeals refuse to apply the mandatory sentencing guidelines to defendant's conviction on the analogous federal second degree murder statute and impose a sentence on the defendant that exceeds the maximum Sentencing Guideline Range?	14-18
CONCLUSION	18

**APPENDIX INDEX**

Opinion of the United States Court of Appeals for the Fifth Circuit	App. A
Denial of Petition for Rehearing and Suggestion for Rehearing En Banc	App. B
Judgment of Conviction and Sentence	App. C

**TABLE OF AUTHORITIES**

**CASES**

<u>Hockenberry v. United States</u> , 422 F.2d 171 (9th Cir. 1970)	16
<u>United States v. Hall</u> , 979 F.2d 320 (3rd Cir. 1992)	16
<u>U. S. v. Kelly</u> , 1 F.3d 1137 (10th Cir. 1993)	18
<u>United States v. Lewis</u> , No. 95-30860 (5th Cir. August 19, 1996)	1,15
<u>Williams v. United States</u> , 327 U.S. 711, 66 S.Ct 778 (1946)	14

**FEDERAL STATUTES**

Fed. Rules of Cr. Proc. Rule 7, 18 U.S.C.A.	2,10
Fed. Rules of Cr. Proc. Rule 52(a)	2,10
18 U.S.C. § 3553(b)	17
18 U.S.C.A. § 1111	3,5,7,10,15,17
18 U.S.C. §§ 7 and 13	4,6,7

**UNITED STATES SENTENCING GUIDELINES**

Section 2A1.1	16
Section 2A1.2	4,6,8,17,18
Section 3A1.1	4,7,17

**STATE STATUTES**

LSA-R.S. 14:30A(5)	2,6,7,10
LSA-R.S. 14:30.1	
LSA-R.S. 14:30C	15,16

NUMBER \_\_\_\_\_

---

IN THE  
SUPREME COURT OF THE UNITED STATES

---

October Term, 1996

---

DEBRA FAYE LEWIS,  
Petitioner

versus

UNITED STATES OF AMERICA,  
Respondent

---

ON PETITION FOR A WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

---

PETITION FOR WRIT OF CERTIORARI

---

The petitioner, **DEBRA FAYE LEWIS**, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit, which, on direct appeal, affirmed petitioner's conviction and sentence.

**OPINIONS BELOW**

The opinion of the United States Court of Appeals for the Fifth Circuit sought to be reviewed, United States v. Lewis, No. 95-30860 (5th Cir. August 19, 1996), appears as Appendix A, and its denial of petitioner's Petition for Rehearing and Suggestion for Rehearing En Banc on September 16, 1996, as appears as Appendix B.

**JURISDICTION**

On August 19, 1996, the United States Court of Appeals for the Fifth Circuit rendered its decision on direct appeal of petitioner's conviction and sentence under jurisdictional authority of 28 U.S.C. §1254(1), and on September 16, 1996, the United States Court of Appeals for the Fifth Circuit denied petitioner's Petition for Rehearing and Suggestion for Rehearing En Banc.

**CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED**

Fed. Rules of Cr. Proc. rule 7, 18 U.S.C.A., provides:

7(c)(3) Harmless Error:

"Error in the citation or submission shall not be grounds for dismissal of the indictment or information or for reversal of the conviction if the error or omission did not mislead the defendants or the defendants were prejudiced."

Fed. Rules of Cr. Proc. rule 52(a) provides:

"Any error, defect, irregularity, or variance which does not affect substantial rights shall be disregarded."

LSA-R.S. 14:30A(5) provides:

"A. First degree murder is the killing of a human being:

(5) When the offender has the specific intent to kill or inflict great bodily harm upon a victim under the age of 12 years or sixty-five years of age or older."



18 USC § 1111(a) provides:

"Murder is the unlawful killing of a human being with malice aforethought. Every murder perpetrated by poison, lying in wait, or any other kind of willful, deliberate, malicious, and premeditated killing; or committed in the perpetration of, or attempt to perpetrate, any arson, escape, murder, kidnapping, treason, espionage, sabotage, aggravated sexual abuse or sexual abuse, burglary, or robbery; or perpetrated from a premeditated design unlawfully and maliciously to effect the death of any human being other than him who is killed, is murdered in the first degree. Any other murder is murder in the second degree.

The Court of Appeals held that the indictment which improperly charged defendant under the Louisiana first degree murder statute in violation of the provisions of the Assimilative Crimes Act, did not require a reversal of the conviction because the error or omission did not mislead the defendant to the defendant's prejudice nor did it substantially affect the defendant's rights. The Court of Appeals further found that because the federal second degree murder statute was most closely analogous or akin to the Louisiana first degree murder statute, and that the two statutes shared the similar elements of proof, then the court was permitted to enter a judgment of conviction of defendant pursuant to the federal second degree murder statute.

Defendant believes that the interpretation by the Court of Appeals is erroneous and that a reversal of the conviction is required because the defendant was misled to her prejudice and that the entering of a conviction under the federal statute for which she was not indicted, prosecuted, or tried, substantially affected her rights.

## United States Sentencing Guidelines

§2A1.2 Second Degree Murder provides:

a) Base Offense Level: 33

§3A1.1 Vulnerable Victim provides:

"If the defendant knew or should have known that a victim of the offense was unusually vulnerable due to age, physical or mental condition, or that a victim was otherwise particularly susceptible to the criminal conduct, increase by 2 levels."

The mandatory application of the Sentencing Guidelines to the analogous federal crime of second degree murder of which the Court of Appeals convicted petitioner, mandates a sentence less than life imprisonment which was imposed. The Sentencing Guidelines provide for a Base Offense Level of 33 and a term of imprisonment range of 135-168 months; if the Base Offense Level is enhanced 2 points by the application of guideline §3A1.1, Vulnerable Victim, the guideline range of imprisonment is 168 - 210 months. The term of life imprisonment imposed by the Court of Appeals exceeds the statutory maximum and it must be vacated and this matter remanded for resentencing.

### **STATEMENT OF THE CASE**

This case raises two important issues of federal criminal law: prosecution under the Assimilative Crimes Act (ACA), 18 USC §§ 7 and 13 and the mandatory application of the United States Sentencing Commission Guidelines, specifically Section 2A1.2, to the

conviction imposed on defendant by the Court of Appeals and whether the failure of the Court of Appeals to consider the mandatory application of the Sentencing Guidelines require that this matter be remanded for sentencing.

The Fifth Circuit held that the government's indictment assimilating state substantive criminal law through the ACA was improper. The Court of Appeals held that the federal murder statutes preempted the field and the federal prosecution could not be based upon an improper assimilative of the Louisiana first degree murder statute.

However, the Fifth Circuit Court of Appeals held that this improper assimilation of the Louisiana first degree murder statute merely rendered the indictment defective and not fatally flawed; therefore, no reversal of the conviction or remand for new trial was necessary. The Fifth Circuit merely entered a conviction against petitioner, DEBRA FAYE LEWIS, of federal second degree murder, 18 USC §1111, which it found most analogous to the Louisiana first degree murder statute.

The Fifth Circuit should have reversed the conviction and remanded for a new trial. Once the prosecution on the assimilated state statute was deemed improper, the trial court, and consequently, the Court of Appeals had no jurisdiction to enter a conviction of an analogous federal crime for which the defendant had not been charged.

The Fifth Circuit entered a conviction of a analogous federal statute: second degree murder. However, the Court of Appeals failed to apply the mandatory sentencing guidelines which mandated a lesser sentence than that imposed by the district court. The Court of Appeals entered a sentence of life imprisonment (the same as that imposed by

the trial court as mandatory under the state first degree murder statute and under the Sentencing Guidelines for federal first degree murder) which was a far greater punishment than provided by the sentencing guideline for federal second degree murder, Section 2A1.2. The Court of Appeals held the punishment was within the maximum statutory punishment and failed to consider the mandatory sentencing guidelines which imposed a lesser term of imprisonment. The Court of Appeals held that no remand for resentencing was necessary as the sentence imposed was not greater than that provided by statute or that imposed by the trial court. This reasoning is clearly erroneous and the decision is clearly contrary to the statutory mandates of the sentencing guidelines and the prohibitions of the Assimilative Crimes Act.

#### **A. Course of Proceedings and Disposition Below**

DEBRA FAYE LEWIS was arrested on or about December 21, 1993 at Fort Polk, Vernon Parish, Louisiana, in the Western District of Louisiana for first degree murder in violation of Louisiana Revised Statutes 14:30A (5) pursuant to the Assimilative Crimes Act, 18 U.S.C. Sections 7 and 13. The alleged crime occurred at Fort Polk, a military reservation which is an area of exclusive federal jurisdiction.

DEBRA FAYE LEWIS and her co-defendant and husband, JAMES M. LEWIS, were brought before the United States Magistrate on an initial appearance on December 21, 1993. Mr. and Ms. Lewis were detained after a hearing. An indictment was filed on or about January 4, 1994 formally charging DEBRA FAYE LEWIS with first degree murder pursuant to Louisiana law, LSA-R.S. 14:30A(5) as assimilated by the Assimilative Crimes



Act. An arraignment was conducted on January 20, 1994 at which time Ms. Lewis entered a plea of not guilty to the charge. On or about February 11, 1994, counsel for DEBRA FAYE LEWIS filed a Motion to Dismiss Indictment urging that the indictment improperly charged the defendant under the Louisiana first degree murder statute, LSA-R.S. 14:30A (5) through the Assimilative Crimes Act, 18 USC §§ 7 and 13 rather than pursuant to the federal murder statute, 18 U.S.C. Section 1111. By judgment dated April 5, 1994, mailed on April 7, 1994, and received on April 14, 1994, the district court denied the motion to dismiss the indictment. The defendant appealed that ruling on April 15, 1994. The United States Court of Appeals for the Fifth Circuit dismissed the appeal on July 28, 1994 because it found the trial court's ruling to be interlocutory and not a final judgment.

This matter was tried before a jury on March 6 - 10, 1995 and March 13 - 14, 1995. The jury found DEBRA FAYE LEWIS guilty of first degree murder pursuant to the Louisiana first degree murder statute on March 14, 1995.

A sentencing hearing was held on August 22, 1995. DEBRA FAYE LEWIS was sentenced to a mandatory prison term of life imprisonment pursuant to the Louisiana first degree murder statutes and the Sentencing Guidelines for federal first degree murder: U.S.S.G. § 3A1.1. A Notice of Appeal was filed on August 30, 1995.

On August 19, 1996, the Fifth Circuit issued its opinion in which it upheld the conviction and sentence under the federal second degree murder statute and not under state law as alleged in the indictment. The Fifth Circuit denied defendant's Petition for Rehearing and Suggestion for Rehearing En Banc on September 16, 1996.

## **B. Statement of the Facts**

On August 19, 1996, the Fifth Circuit issued its opinion. That opinion held that the government improperly indicted the defendant by assimilating the Louisiana first degree murder statute pursuant to the Assimilative Crimes Act. The court held that the federal murder statutes preempted the field. However, the Fifth Circuit held that a reversal of the conviction and remand for retrial was unnecessary because the indictment was merely "defective and not fatally flawed." The Court of Appeals reasoned that the defendant was not prejudiced by the error and that the evidence supported a conviction under the federal second degree murder statute which the court found analogous to and requiring the same elements of proof as the Louisiana first degree murder statute.

Further, the Fifth Circuit determined that the case need not be remanded for resentencing because the sentence of life imprisonment imposed by the trial court was within the statutory maximum allowed by the federal second degree murder statute. Therefore, a sentence of life imprisonment was imposed. The Fifth Circuit failed to consider or apply the relevant and mandatory Sentencing Guidelines to the crime of which it convicted the defendant. The Sentencing Guidelines for federal second degree murder are mandatory and set out a guideline range far less than life imprisonment: U.S.S.G. § 2A1.2. The Court of Appeals committed clear error in imposing a sentence without considering or applying the Sentencing Guidelines, and without remanding for resentencing.

These errors were raised by defendant in her Petition for Rehearing and Suggestion for Rehearing En Banc which was denied on September 16, 1996.

**REASONS FOR GRANTING THE WRIT**

**CAN THE COURT OF APPEALS ENTER A JUDGMENT OF CONVICTION UNDER AN "ANALOGOUS" FEDERAL STATUTE IN LIEU OF THE CONVICTION UNDER AN IMPROPERLY ASSIMILATED STATE STATUTE AT TRIAL, WHEN DOING SO IS NOT HARMLESS ERROR AND CAUSES SUBSTANTIAL PREJUDICE TO THE DEFENDANT'S RIGHTS?**

In this case, the Court of Appeals for the Fifth Circuit agreed with the arguments of defense counsel that the government improperly assimilated the Louisiana first degree murder statute in its indictment and subsequent prosecution of petitioner. The Court of Appeals determined that the assimilation rendered the indictment defective but not "fatally flawed." The Court of Appeals reasoned that the Louisiana first degree murder statute was analogous to and most akin to the federal second degree murder statute and that both statutes shared the same common elements of proof. The Court of Appeals further held that there was no substantial prejudice to the defendant by the prosecution under the state statute because this placed the defendant on notice of the crime charged and the elements of proof. The Court of Appeals found that the imposition of a conviction and sentence under the analogous federal second degree murder statute did not substantially prejudice the defendant and that such a conviction was appropriate. The Court of Appeals then found it was unnecessary to reverse the original conviction and remand for new trial as the elements of proof had been met and that a conviction should be entered.

Petitioner disagrees with the analysis of the Court of Appeals. The Louisiana first degree murder statute, LSA-R.S. 14:30A(5) provides that:

"A. First degree murder is the killing of a human being:

(5) When the offender has the specific intent to kill or inflict great bodily harm upon a victim under the age of 12 or sixty-five years of age or older."

The federal second degree murder statute, 18 U.S.C. § 1111(a) provides:

"Murder is the unlawful killing of a human being with malice aforethought. Every murder perpetrated by poison, lying in wait, or any other kind of willful, deliberate, malicious, and premeditated killing; or committed in the perpetration of, or attempt to perpetrate, any arson, escape, murder, kidnapping, treason, espionage, sabotage, aggravated sexual abuse or sexual abuse, burglary, or robbery; or perpetrated from a premeditated design unlawfully and maliciously to effect the death of any human being other than him who is killed, is murder in the first degree. Any other murder is murder in the second degree.

Fed. Rules of Cr. Proc. rule 7, 18 U.S.C.A., provides:

7(c)(3) Harmless Error:

"Error in the citation or submission shall not be grounds for dismissal of the indictment or information or for reversal of the conviction if the error or omission did not mislead the defendants or the defendants were prejudiced."

Fed. Rules of Cr. Proc. rule 52(a), 18 U.S.C.A. provides:

"Any error, defect, irregularity, or variance which does not affect substantial rights shall be disregarded."



Defendant acknowledges that in some cases the imposition of sentence pursuant to an analogous federal statute in lieu of the improperly assimilated state statute would not cause substantial prejudice to the defendant. However, in this case, defendant urges that substantial prejudice did occur in a couple of respects. First, the Louisiana first degree murder statute requires as its elements of proof that the defendant have the specific intent to kill or the specific intent to inflict great bodily harm and the victim is a person under the age of 12 years. The prejudice claim of the defendant is not merely an academic or mechanical application of what the court considers to be the elements of proof required of the statute. The defendant contends that under the Louisiana statute, the jury could convict the defendant once the prosecution proved that the victim sustained great bodily harm and that the victim was under 12 years of age. Under the Louisiana statutory framework, second degree murder could not have been found because the additional element that the victim be under the age of 12 years did not exist.

A comparison of the federal and state statutes indicate that the state statute improperly expanded the criminal act much broader than did the federal statute. Furthermore, the federal first degree murder statute required a finding of premeditation whereas the first degree murder statute in Louisiana did not. Federal second degree murder did not require premeditation but required malice aforethought. The inquiry cannot stop by a finding that the provisions of the federal second degree murder statute which requires malice aforethought includes an intent to do seriously bodily injury which is analogous to the elements of proof of specific intent to inflict great bodily harm required by the Louisiana first degree murder statute.

Petitioner contends that it was the purpose of the government to charge her under the state first degree murder statute because it made its burden of proof easier. In that respect, the jury would be confronted with the situation in which a child under the age of 12 died from injuries received and that those injuries themselves would be indicative of an intent to do serious bodily injury. However, the focus on the requirements of specific intent are somewhat obscured. The trial testimony of Dr. Trant, the forensic pathologist for the government indicated that the blunt traumas to the head which caused brain swelling and death were not readily apparent through the scalp and hair. Any hemorrhages under the skin or bruises would be invisible to the defendant. Therefore, the defendant would have no ability to suspect brain swelling and eventual death nor comprehend what grave bodily injury had occurred. (Tr. pp. 288)

The photographs introduced into evidence by the government and testified from by Dr. Trant indicated that there were numerous deep bruises to the skin which caused significant blood loss which contributed to death or could have been an independent cause of death. Dr. Trant testified under cross examination that, if the child had her clothes on, it might not be possible for the defendant to see the injuries that one would expect would cause great harm. (Tr. pp. 323) Furthermore, Dr. Trant testified that one would not know the seriousness of the problems with the child until the child became lethargic, began to develop an irregular heartbeat, her eyes rolled back in her head, and she stopped breathing. (Tr. pp. 333-334)

Clearly, the photographs and the requisite specific intent to inflict great bodily harm is at issue in this case. Prejudice to the defendant is the fact that using the state statute gave the government an easier burden of proof and a much more severe penalty.

Another area of prejudice to the defendant is the fact that she was convicted and sentenced under the Louisiana first degree murder statute and the Sentencing Guidelines for federal first degree murder. The probation officer considered the relevant sentencing guidelines for state first degree murder as being equivalent to federal first degree murder. As such, the guideline for federal first degree murder was used. The court found that the sentence was a mandatory term of life imprisonment.

On appeal, the Court of Appeals held that the analogous federal criminal statute was federal second degree murder. It then imposed a sentence of life imprisonment without considering the Sentencing Guidelines. The court reasoned it was unnecessary to remand for resentencing because the sentence imposed by the district court was within the statutory maximum provided under the federal second degree murder statute. This issue is addressed separately as it was clear error to fail to apply the mandatory sentencing guidelines.

Defendant contends that she was prejudiced by the assimilation of the state and first degree murder statute. To merely state on appeal that the court will recognize that the state statute was improperly assimilated and then affirm a conviction under the analogous federal murder statute and impose a new sentence pursuant to federal law and impose the same exact sentence does not diminish the prejudice. In fact, the purpose

of a reversal and remand for new trial is borne out by the improper result reached in this case.

The courts have found that reversal is necessary in cases where the fact that the defendant is being prosecuted for a crime which is not a crime under federal law. This court in Williams v. United States, 327 U.S. 711, 66 S.Ct. 778 (1946), held that the assimilative crimes act could not be used to make a state statute a federal offense when Congress already defined the crime under the federal code. Furthermore, the Williams court held that the assimilative crimes act could not assimilate a state crime in order to redefine or expand a federal statute. Like Williams, this case used the state statute to enlarge the federal statute and created a crime which Congress had not made a crime. Comparing the Louisiana first degree murder statute and the federal first degree murder statute, one recognizes that the government would have been unable to prove premeditation in order to convict the defendant under the federal first degree murder statute. Therefore, the government chose a state statute which created a greater penalty than that which was applicable under federal law. This is substantial prejudice to the petitioner and not harmless error. A reversal of the conviction should be granted and this matter remanded for new trial.

**CAN THE COURT OF APPEALS REFUSE TO APPLY THE MANDATORY SENTENCING GUIDELINES TO DEFENDANT'S CONVICTION ON THE ANALOGOUS FEDERAL SECOND DEGREE MURDER STATUTE AND IMPOSE A SENTENCE ON THE DEFENDANT THAT EXCEEDS THE MAXIMUM SENTENCING GUIDELINE RANGE?**



The Court of Appeals held that the flawed assimilation of the Louisiana first degree murder statute did not prejudice defendant or affect her substantial rights. The Court of Appeals determined that the evidence adduced at trial was sufficient to convict the defendant of the analogous federal criminal statute: second degree murder. The court reasoned that the two statutes shared similar elements of proof and that they were comparable.

Once the analogous federal conviction was decided upon, the Court of Appeals next considered what sentence to impose. It held "[r]esentencing is only required where the district court has imposed a sentence that exceeded the maximum sentence that the defendant would have received if sentenced under the applicable federal statute. " [Opinion, Court of Appeals, p. 16.]

The court further stated:

"Here, the Lewises did not receive a sentence exceeding the maximum sentence allowed under the federal murder statute. The United States Code makes second degree murder punishable by imprisonment "for any term of years or for life." 18 U.S.C. § 1111 (emphasis added). Mr. and Mrs. Lewis both received life sentences. Unlike Hockenberry, the Lewises' sentences are supported by their joint indictment. Therefore, we need not remand for resentencing." [Opinion, Court of Appeals, p. 17.]

This holding is clearly erroneous. Petitioner was sentenced by the trial court to a term of life imprisonment which was mandatory under the Louisiana first degree murder statute, LSA-R.S. 14:30 C; which provides:

"C. Whoever commits the crime of first degree murder shall be punished by death or life imprisonment at hard labor without benefit of parole, probation, or suspension of sentence in accordance with the determination of the jury."

Defendant was sentenced to life imprisonment under the state law upon which she was convicted the Louisiana first degree murder statute and the analogous federal sentencing guideline for first degree murder: U.S.S.G. § 2A1.1.

The Court of Appeals relied on Hockenberry v. United States, 422 F.2d 171 (9th Cir. 1970) and United States v. Hall, 979 F.2d 320 (3rd Cir. 1992) for the proposition that remand for resentencing was unnecessary because the actual sentence imposed on petitioner was not more severe than the maximum term of imprisonment provided by the federal statute. Hockenberry held that a remand for resentencing was necessary because the term of imprisonment imposed under the assimilated state statute exceeded the maximum sentence allowed by the appropriate federal statute. Hall reached the opposite result: the sentence imposed under the improperly assimilated state statute was less than the maximum sentence allowed under the appropriate federal regulation; therefore, a remand for resentencing was unnecessary as Hall had not been prejudiced nor subjected to a more severe sentence.

The government never sought the death penalty in the instant case. The jury was instructed that the case did not involve the death penalty; therefore, the only sentence applicable upon conviction was life imprisonment. In fact, the Presentence Report used the Sentencing Guideline for federal first degree murder: U.S.S.G. § 2A1.1.

Petitioner has been subjected to a more severe sentence, and she has been prejudiced by it. Petitioner was sentenced to life imprisonment under the Louisiana first degree murder statute and the federal sentencing guidelines for federal first degree murder. The Court of Appeals held that the petitioner was guilty of federal second degree murder. The maximum sentence is "for any term of years or for life." 18 U.S.C.A. § 1111(a). However, the Sentencing Guidelines applicable to federal second degree murder, U.S.S.G. § 2A1.2, assigns a base offense level of 33 and a sentencing range of 135 - 168 months. Even if the base offense level were enhanced by 2 points for the vulnerability of the victim (a child), [U.S.S.G. § 3A1.1] the applicable sentencing range for a base level offense of 35 is 168 - 210 months.

How can the Court of Appeals hold that petitioner did not receive a sentence exceeding the maximum sentence allowed under the federal second degree murder statute? It cannot so hold. The sentencing guidelines are mandatory and must be applied to a defendant who is convicted of a federal offense. If the sentencing court departs from the guidelines, it must specifically articulate reasons for the departure. Further, 18 U.S.C.A. § 3553(b) provides:

"[i]n determining whether a circumstance was adequately taken into consideration, the court shall consider only the sentencing guidelines, policy statements, and official commentary of the Sentencing Commission."

A sentence of life imprisonment exceeds the maximum sentence provided by U.S.S.G. § 2A1.2 of 210 months. See also U. S. v. Kelly, 1 F.3d 1137 (10th Cir. 1993). The proper remedy is to vacate the sentence imposed by the Court of Appeals and remand for resentencing.


In light of this clear error and prejudice to the petitioner, this court is urged to grant the writ of certiorari.

**CONCLUSION**

For the reasons stated herein, the petitioner urges this Court to grant the writ of certiorari.

Respectfully submitted,

**FRANK GRANGER**  
**A PROFESSIONAL LAW CORPORATION**

  
**FRANK GRANGER**  
Federal ID No. 06219  
203 West Clarence Street  
Lake Charles, Louisiana 70601  
Telephone: (318) 439-2732  
Fax: (318) 439-1655

Attorney for petitioner



NUMBER \_\_\_\_\_

IN THE  
SUPREME COURT OF THE UNITED STATES

October Term, 1996

DEBRA FAYE LEWIS,  
Petitioner

versus

UNITED STATES OF AMERICA,  
Respondent

ON PETITION FOR A WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

CERTIFICATE OF SERVICE


I, **FRANK GRANGER**, court appointed counsel for petitioner, **DEBRA FAYE LEWIS**, hereby certify that on this 16th day of December, 1996, one copy of the Petition for Writ of Certiorari and of the Motion for Leave to Proceed "In Forma Pauperis" in the above captioned matter was mailed, first class postage prepaid, to the following:

Josette Cassiere  
Assistant United States Attorney  
300 Fannin Street, Suite 3201  
Shreveport, Louisiana 71101-3068

Larry Regan  
Assistant United States Attorney  
611 Broad Street  
Lake Charles, Louisiana 70601

Rebecca Hudsmith  
Federal Public Defender  
102 Versailles Boulevard, Suite 816  
Lafayette, Louisiana 70501

I further certify that all parties required to be served have been served.

  
**FRANK GRANGER**  
Federal ID No. 06219  
203 West Clarence Street  
Lake Charles, Louisiana 70601  
Telephone: (318) 439-2732  
Fax: (318) 439-1655

Attorney for petitioner

IN THE UNITED STATES COURT OF APPEALS U. S. COURT OF APPEALS

FOR THE FIFTH CIRCUIT

**FILED**

AUG 19 1996

No. 95-30860

CHARLES R. FULBRUGE III  
CLERK

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

JAMES M. LEWIS;  
DEBRA FAYE LEWIS,

Defendants-Appellants.

Appeal from the United States District Court  
for the Western District of Louisiana

**APPENDIX A**

Before JOLLY, DUHÉ, and STEWART, Circuit Judges.

CARL E. STEWART, Circuit Judge:

James M. Lewis and Debra Faye Lewis appeal their convictions for first degree murder under Louisiana law pursuant to the Assimilative Crimes Act. Because the federal murder statute and sentencing guidelines occupy the area of the law, they contend that the district court erred in refusing to dismiss their indictments. They also challenge the sufficiency of the evidence as well as evidentiary rulings made by the district court. Additionally, Debra Lewis argues that Battered Women's Syndrome diminished her capacity to form a specific intent to kill or inflict great bodily harm or to aid and abet James Lewis. For the following reasons, we reverse the district court's ruling regarding the indictments but affirm the defendants' convictions and sentences.

RECEIVED AUG 21 1996

## FACTS

James Lewis and his wife, Debra Lewis, were arrested for the beating death of four-year-old Jadasha D. Lowery, the biological daughter of James Lewis and Stacy Lowery. The death occurred on the military reservation at Fort Polk in Vernon Parish, Louisiana, where Mr. Lewis was stationed with the United States Army.<sup>1</sup>

On the day of her death, Jadasha was subjected to severe beatings, which resulted in several contusions and bruises on her scalp and which caused massive bruising over her entire body. The body bruises caused hemorrhages beneath the skin that redirected one-third to two-thirds of her entire blood volume from her circulatory system and into the tissues surrounding the injuries. The head injuries caused Jadasha to suffer cerebral edema,<sup>2</sup> which was identified as the cause of her death. The indictment charged the Lewises with first degree murder under Louisiana law through

---

<sup>1</sup>Fort Polk, a United States military reservation, is a federal enclave as defined in 18 U.S.C. § 7.

<sup>2</sup>Cerebral edema is a condition in which the brain swells and presses on the brain stem and which eventually causes respiratory function to cease.

the Assimilative Crimes Act.<sup>3</sup> After receiving guilty verdicts, both Lewises were sentenced to life imprisonment. The Lewises appealed.

## DISCUSSION

### A. ASSIMILATIVE CRIMES ACT.

The Lewises argue that the indictment under which they were charged is defective because it improperly charges them under La. Rev. Stat. 14:30A(5) when 18 U.S.C. § 1111 criminalizes the same conduct. Mr. Lewis asserts that first degree murder of a person under the age of twelve under the Louisiana statute is comparable to second degree murder under section 1111, with the minor age of the victim causing punishment to be enhanced under the sentencing guidelines. Mrs. Lewis contends that the government was statute "shopping" when it charged them under Louisiana law in order to obtain a lesser standard of proof and the benefit of more severe penalties in the event the jury returned verdicts on lesser included offenses.

Our examination of the Lewises' indictment requires us to analyze the Assimilative Crimes Act. Interpretations of statutes receive de novo review. Estate of Moore v. C.I.R., 53 F.3d 712, 714

---

<sup>3</sup>The indictment provides as follows:

That on or about the 20th day of December, 1993, at Fort Polk, Louisiana, in the Western District of Louisiana, upon lands acquired for the use of the United States and under the exclusive jurisdiction thereof, JAMES M. LEWIS and DEBRA FAYE LEWIS, defendants herein, each knowingly and willfully aided and abetted, one by the other, did, with specific intent to inflict great bodily harm, commit first degree murder of Jadasha D. Lowery, a human being under the age of twelve years, in violation of Title 14 Louisiana Revised Statutes Annotated, Section 30(5), [Amended March 6, 1996 to 30(A(5))], all in violation of Title 18, United States Code, Sections 7, 13, and 2. {18 U.S.C. §§ 7, 13, & 2; La. R.S. 14:30(5)}.



(5th Cir. 1995). Similarly, review of a district court's conclusion that an indictment is sufficient is reviewed under the de novo standard. United States v. Green, 964 F.2d 365, 372 (5th Cir. 1992), cert. denied, 506 U.S. 1055 (1993). After evaluating the language of the ACA, Supreme Court precedent, and other federal jurisprudence, we are compelled to conclude that the Lewises' indictment is invalid.

The ACA makes punishable crimes occurring on federal enclaves although Congress has not expressly addressed the conduct in the federal statutes. The ACA provides:

Whoever within or upon any of the places now existing or hereafter reserved or acquired as provided in section 7 of this title, is guilty of any act or omission which, although not made punishable by any enactment of Congress, would be punishable if committed or omitted within the jurisdiction of the State . . . in which such place is situated, by the laws thereof in force at the time of such act or omission, shall be guilty of a like offense and subject to like punishment.

18 U.S.C. § 13. Through the ACA the government may use state statutes to prosecute offenders on federal enclaves "only if no act of Congress directly makes the offender's conduct punishable." United States v. Brown, 608 F.2d 551, 553 (5th Cir. 1986). The ACA fills in gaps existing in federal statutes regarding criminal law. Id. However, where Congress has enacted legislation criminalizing conduct on the enclaves, the federal statutes preempt the state laws regarding those crimes. United States v. Sharpnack, 355 U.S. 286, 291 (1958).

The Supreme Court shed light on the limitations of the ACA in Williams v. United States, 327 U.S. 711 (1946). In Williams, the Court reversed the conviction of a white married man convicted under the Arizona statutory rape law pursuant to the ACA for having sex with a seventeen-year-old Indian girl on an Indian reservation. 327 U.S. at 725. The federal statutes punished carnal knowledge of a minor girl when the victim was under the age of sixteen, whereas the Arizona statute

punished the same conduct when the victim was under the age of eighteen. The Arizona statute provided a harsher penalty than the federal statute. Id. at 717. Interpreting the language existing in the ACA at the time, the Court concluded that the precise acts of the defendant were made criminal under federal statutes addressing adultery or fornication as well as carnal knowledge, and the government could not enlarge the definition of the federal carnal knowledge crime by incorporating the state statutory rape statute through the ACA. Id. at 717-18. The Court further noted that the ACA "has a natural place to fill through its supplementation of the Federal Criminal Code, without giving it the added effect of modifying or repealing existing provisions of the Federal Code." Id. at 718. The language of the ACA referred "in a generic sense" to "acts of a general type or kind." Id. at 722. The Court held that in Williams' case "not only has the generic act been covered by the [federal] definition of having carnal knowledge, but the specific acts have been made 'penal' by the [federal] definition of adultery." Id. at 723.

This court, like the majority of the other circuits,<sup>4</sup> has interpreted Williams as establishing a "precise acts" test regarding the applicability of the ACA. See United States v. Brown, 608 F.2d 551, 554 (5th Cir. 1979). In Brown, the court held that the government could prosecute the

---

<sup>4</sup>The circuit split following Williams is well recognized. See, e.g., United States v. Broadnax, 688 F. Supp. 1080, 1081-82 (E.D. Va. 1988); and United States v. Smith, 614 F. Supp. 454, 460 (D. Me. 1985), vacated in part on other grounds, United States v. Marica, 795 F.2d 1094 (1st Cir. 1986). The majority view holds that the ACA does not apply when the "precise act" prohibited by the state statute is defined and prohibited by the federal statute. See generally, United States v. Johnson, 967 F.2d 1431 (10th Cir. 1992), cert. denied, 506 U.S. 1082 (1993); United States v. Sasnett, 925 F.2d 392 (11th Cir. 1991); United States v. Griffith, 864 F.2d 421 (6th Cir. 1988), cert. denied, 490 U.S. 1111 (1989); United States v. Kaufman, 862 F.2d 236 (9th Cir. 1988); and Fields v. United States, 438 F.2d 205 (2d Cir.), cert. denied, 403 U.S. 907 (1971). Compare the minority view holding that the ACA does not apply when the federal statute punishes the "generic conduct" covered in the statute. United States v. Butler, 541 F.2d 730 (8th Cir. 1976).



defendant under the Texas child abuse statute even though injury to a child could be punishable under the federal assault statute because the precise act of injury to a child was not proscribed by federal law and the state statute was designed to punish specific conduct of a different character than the conduct proscribed by the federal assault statute. Mrs. Brown was charged with injuring her husband's biological two-year-old son, whom she struck on the head with a blunt, flat instrument. Though surgery revealed a subdural hematoma covering the left side of his brain, the child survived. The court in Brown rejected arguments that use of the child abuse statute enlarged the scope of the federal offense. It found the child abuse and assault statutes different because of the nature of the offense being punished. The court relied on the Second Circuit case, Fields v. United States, 438 F.2d 205 (2d Cir. 1971), to demonstrate that child abuse is a different type of assault than the conduct covered under the federal assault statute.

Similarly, in United States v. Fesler, 781 F.2d 384, 391 (5th Cir. 1986), the court clarified that the federal statute and the state statute must involve different elements and must seek to punish different conduct. In Fesler, the Feslers were charged with murder under the federal statute and causing serious bodily injury under the Texas child abuse statute for the scalding death of their ten-month-old daughter whom they deliberately dipped in scalding water. The defendants alleged that the indictment violated the ACA. The court held that because the statutes covered different "precise acts," no violation had occurred. Id. at 391. The court noted that death of a human being, essential for the manslaughter conviction, was unnecessary for the child abuse conviction. The court further explained that "[i]t is important that the state statute seeks to punish a particular offense at which the federal statute is not aimed, child abuse." Id. Accordingly, the court upheld application of the ACA in this context.

This court consistently has found that child abuse constitutes a different "precise act" which the government may charge in addition to murder under the federal statute. See United States v. Webb, 796 F.2d 60, 62 (5th Cir. 1986), cert. denied, 479 U.S. 1038 (1987) (convicted of second degree murder under the federal statute and injury to a child under the state statute for the death of a six-year-old boy whose head was slammed against a wall and who was scalded). Federal jurisprudence demonstrates that the different nature of the "act" regarding child abuse does not eliminate the need for seeking punishment for murder under the federal statute when the abuse results in death. See United States v. Phillip, 948 F.2d 241, 245 (6th Cir. 1991), cert. denied, 504 U.S. 930 (1992) (the defendant was charged with second degree murder under the federal statute and committing and permitting child abuse under the Kentucky child abuse statute); and United States v. Harris, 661 F.2d 138, 139 (10th Cir. 1981) (the defendant was charged with murder under the federal statute and the Wyoming child abuse statute). Indeed, where conviction under the state statute was allowed, the state child abuse statute was alleged in addition to murder under the federal statute, rather than in place of it.

Herein lies the distinction between the present case and Brown and Fesler. The government in the present case has entirely usurped the federal murder statute rather than supplemented the statute with "gap-filling" state law. The government uses the precise acts test as reasoned in Brown and Fesler to argue that it may use the state murder statute although the federal statute already punishes murder. We find that the precise acts test cannot save this indictment.

The "precise act" sought to be punished under 18 U.S.C. § 1111 and La. Rev. Stat. § 14:30A(5) for murder of a victim under twelve<sup>3</sup> is the intentional killing of a human being (i.e., "murder"). This is the conduct clearly identified in both statutes. Murder is punishable under both the state and federal statutes though they define and punish the conduct differently. Section 1111 provides the following definition of murder: "Murder is the unlawful killing of a human being with malice aforethought." The section then delineates the elements needed for first degree murder and second degree murder:

Every murder perpetrated by [1] poison, [2] lying in wait, or [3] any other kind of willful, deliberate, malicious, and premeditated killing; or [4] committed in the perpetration of, or attempt to perpetrate, any arson, rape, burglary, or robbery; or [5] perpetrated from premeditated design unlawfully and maliciously to effect the death of any human being other than him who is killed, is murder in the first degree.

Any other murder is murder in the second degree.

Section 14:30A(5) of the Louisiana Revised Statutes in pertinent part provides:

A. First degree murder is the killing of a human being:

....

(5) When the offender has specific intent to kill or to inflict great bodily harm upon a victim under the age of twelve or sixty-five years of age or older.

The varying definitions affect the degree of the crime and the level of punishment. "Murder of a child" does not constitute a different act of murder omitted from the federal murder statute. That Louisiana chose to define first degree murder regarding children differently than Congress defines it does not automatically make murdering a child a different or even a more specific act.

---

<sup>3</sup>Hereinafter we refer to the crime of "murder of a victim under twelve" as "murder of a child" or "child murder."

The government attempts to show that the state's concern for child abuse prompted the specific reference to "victims under the age of twelve" in the first degree murder statute. We conclude that the government exaggerates the significance of the inclusion of the child murder provision in the Louisiana statute in order to piggyback the child abuse reasoning set forth in Brown and Fesler. The Louisiana legislature placed child murder in the first degree murder statute to deter crimes against these vulnerable members of society and to ensure that if a child is murdered the offender is guaranteed to receive a certain sentence.<sup>6</sup> This reasoning explains the placement of all acts listed in the Louisiana first degree murder provision as well as the reasoning underlying the enumerated crimes qualifying for first degree murder under the federal statute. The lists in both statutes define what raises a particular homicide to the grade of first degree murder under the respective systems. We reject the position taken by the government during oral argument that it used the Louisiana statute to "further define" the federal law. Further defining would create a more expansive definition of federal murder. Accordingly, to treat the murder of a child as conduct of a different nature would impermissibly enlarge the scope of the federal statute, which the Supreme Court in Williams instructed that we cannot do. We cannot permit the government to create the illusion of a "gap" in the law where none exists in order to enhance its ability to convict or to exact a harsher penalty.

---

<sup>6</sup>Though not reflected in the murder statute, Congress addresses the vulnerability concern in the sentencing guidelines. Section 3A1.1 of the Federal Sentencing guidelines allows a judge to increase a defendant's sentence by two levels when the victim was a child. Section 3A1.1 provides: "If the defendant knew or should have known that a victim of the offense was unusually vulnerable due to age . . . or that the victim was otherwise particularly susceptible to the criminal conduct, increase by 2 levels."



Further, contrary to the government's suggestion, public concern regarding child abuse does not change the character of murder when a child is involved. The distinction we have recognized between assault under the federal statute and child abuse cannot transfer by analogy to create a tangible distinction between murdering an adult and murdering a child. Child abuse qualifies as a separate class of conduct because the nature of the crime spawns methods and treatments not needed in a general assault case. This is not necessarily true regarding the murder of a child. Children are murdered in many ways unrelated to child abuse. For example, if a child is shot during a robbery on a federal enclave, this conduct constitutes murder plain and simple, and this offense would not be different in nature so as to warrant invocation of the ACA. It would be illogical to say that child murders resulting from child abuse can be charged under the state statute pursuant to the ACA whereas all other child murders must be prosecuted under the federal statute. We find that the murder of a child is not a different degree of homicide that removes it from the federal murder statute.<sup>7</sup>

The government's interpretation of Brown and the precise acts test goes too far. Its interpretation would allow the wholesale incorporation of state law via the ACA. Neither Congress nor the Supreme Court intended such a result. For ACA purposes, a precise act cannot qualify as a "specific conduct of a different character" when the conduct is covered by a federal statute and when the acts described in the federal and state statutes differ only in name, definition, or

---

<sup>7</sup>Our decision might be different if the government were prosecuting the Lewises under a Louisiana murder statute that expressly made criminal child murders resulting from child abuse. This would make the precise act criminalized under the state statute qualify as being conduct of a different nature or character.

punishment.<sup>8</sup> The essential nature or theory of an act made criminal by a state statute must differ substantially from the federal statute in order to elevate the conduct to a precise act.

For example, "driving under the influence manslaughter" is conduct substantially different in nature than general "manslaughter." See United States v. Sasnett, 925 F.2d 392 (11th Cir. 1991). The theory underlying DUI manslaughter is to remove the need to prove that the drinking caused an accident. *Id.* at 396. The government need only prove that the defendant had a blood alcohol level of .10 or higher. The court in Sasnett allowed application of the ACA because no federal statute defined or prohibited this precise act. See also, United States v. Jones, 244 F. Supp. 181, 183 (S.D.N.Y. 1965) (allowing application of the ACA to prosecute using the "different theory" of disorderly conduct under the state statute rather than the federal parading/picketing statute where the defendants chained themselves to the court entrances to prevent entry or exit).

Murder of a child as defined under the Louisiana first degree murder statute cannot clear the "substantially different" hurdle. See Shirley v. United States, 554 F.2d 767, 768-69 (6th Cir. 1977)

---

<sup>8</sup>We note in passing that the Sixth Circuit persuasively has identified four categories of cases that arise under ACA cases: (1) all crimes criminal under the federal law are also criminal under state law, but additional conduct is criminal under state law, (2) federal law encompasses a broader area than the state law, but the state law carries harsher penalties or an easier burden of proof, (3) state and federal laws overlap to a degree, but each occupies an area of law not covered by the other, and the conduct at issue falls within the overlapped area, and (4) the laws overlap, as described in the third group; however, the conduct falls within the area in which the act is criminal under the state law but not the federal law. See United States v. Griffith, 864 F.2d 421, 423-24 (6th Cir. 1988). The district court in the present case found that this case falls within the third category because murder of a child could be punishable as federal murder, but the Louisiana statute presents a theory essentially different from that federal statute by taking into account the compelling state interest in protecting children under the age of twelve. We disagree. We find that this case falls within the second category. The Lewises' precise conduct is prohibited by the federal statute, but the penalty is harsher under the Louisiana statute. Murder of a child carries an automatic penalty of life or death in Louisiana. As explained above, the theories underlying the two statutes are not different.

(ACA inapplicable though armed robbery under the state statute was more specific and more harshly punished than the federal robbery statute); and United States v. Big Crow, 523 F.2d 955, 958 (8th Cir. 1975), cert. denied, 424 U.S. 920 (1976) (ACA inapplicable though the state statute prohibited assault resulting in great bodily harm and provided a stiffer penalty than the federal assault statute).

Accordingly, we hold that the federal murder statute preempts the Louisiana first degree murder statute because the precise act here, killing a human being, is punishable under the federal statute and because the nature of the crime "murder of a child" does not differ substantially from the nature and theory of murder in general. The government improperly invoked the ACA to charge the Lewises under the Louisiana statute. The indictment contains an infirmity in that it references La. Rev. Stat. § 14:30A(5). We must determine whether the convictions and sentences can survive in spite of this infirmity.

#### B. REMEDY REGARDING FLAWED ASSIMILATION.

The infirmity discussed above is not fatal to the indictment in this case. We find the infirmity to be an apparent rather than a real defect. Accordingly, though we find error in the indictment, we will uphold the Lewises' convictions unless they establish reversible error on another ground. This court has previously adopted the maxim that "[w]here the government wrongfully secures a conviction under a state statute pursuant to the Assimilative Crimes Act, rather than under the relevant federal statute, the appropriate remedy is not reversal of the conviction, but rather a vacating of the sentence and a remand to the district court for resentencing[.]" provided that the basic elements of the crime as defined in the federal statute were proven at trial and provided that no trial errors warrant reversal of the convictions. See United States v. Olvera, 488 F.2d 607, 608 (5th Cir. 1973), cert. denied, 416 U.S. 917 (1974) (citing United States v. Chaussee, 536 F.2d 637,

644 (7th Cir. 1976) (citing United States v. Word, 519 F.2d 612, 618 (8th Cir. 1975)). Compare United States v. Butler, 541 F.2d 730, 737 (8th Cir. 1976) (the court discussed the applicable remedy of remanding for sentencing, but instead vacated the convictions because the government did not prove at trial the interstate commerce nexus, which was not an element of the state crime).<sup>9</sup>

In Olvera, the government conceded on appeal that the federal statute was controlling rather than the ACA and the Texas statute. 488 F.2d at 608. This court held that the "sentence must be vacated and the cause remanded for entry of a new judgment imposing sentence under the federal statute." The Ninth Circuit took a similar position in Hockenberry v. United States, 422 F.2d 171, 174 (9th Cir. 1970). In Hockenberry, although the government conceded that the existence of an applicable act of Congress precluded assimilation of the California statute through the ACA, the court refused to dismiss the indictment. The indictment stated a crime against the United States even though the language of the California statute differed from the applicable federal statute. 422 F.2d at 173-74. The court reasoned that rules 7(c) and 52(a) of the Federal Rules of Criminal Procedure instruct that

"error in the citation of the statute or its omission shall not be ground for dismissal of the indictment \* \* \* or for reversal of a conviction if the error or omission did not mislead the defendant to his prejudice" and . . . "any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded."

Id. at 174 (internal brackets omitted). After noting that the defendant did not allege prejudice or defects affecting substantial rights and then finding that the record would not support either claim,

---

<sup>9</sup>When discussing the conclusions reached in Chaussee, the district court below acknowledged the quote regarding remand. United States v. Lewis, 848 F. Supp. 692, 695 n.3 (W.D. La. 1995).



the court rejected the argument that the court lacked jurisdiction to prosecute the defendant. The Hockenberry court affirmed the defendant's conviction but remanded the case for resentencing.<sup>10</sup>

Likewise, we find that remand for reindictment and retrial is not required under the circumstances of this case. The basic elements are the same for second degree murder under 18 U.S.C. § 1111(a) and first degree murder under La. Rev. Stat. § 14:30A(5). Both statutes require proof of specific intent<sup>11</sup> and the killing of a human being. Regarding intent, 18 U.S.C. § 1111 requires proof of "specific intent to inflict serious bodily injury," and La. Rev. Stat. § 14:30A(5) requires proof of "specific intent to inflict great bodily harm." The dissimilar phrasing does not

---

<sup>10</sup>"It is well settled [in the ACA context] that an incorrect statutory reference in an indictment does not require reversal where all of the essential elements of the correct statute are otherwise covered, but that any sentence imposed in excess of that allowed under the correct statute must be vacated and the case remanded for resentencing." United States v. Walker, 557 F.2d 741, 746-47 (10th Cir. 1977). Several circuits that have wrestled with defective indictments containing erroneously assimilated state law have reached the same conclusion. See, e.g., United States v. Hall, 979 F.2d 320, 323 (3d Cir. 1992); United States v. Lavender, 602 F.2d 639, 640-41 (4th Cir. 1979); United States v. Chaussee, 536 F.2d 637, 644-45 (7th Cir. 1976); United States v. Word, 519 F.2d 612, 618-19 (8th Cir.), cert. denied, 423 U.S. 934 (1975); United States v. Patmore, 475 F.2d 752, 753 (10th Cir. 1973); Dunaway v. United States, 170 F.2d 11, 12-13 (10th Cir. 1948).

<sup>11</sup>We reject Mrs. Lewis's arguments that the federal murder statute requires proof of "intent to kill." She says that because she and her husband never intended to kill Jadasha they could not be convicted of murder under the federal statute. This circuit has indicated that malice aforethought may be inferred from circumstances which show a callous, wanton, or extremely indifferent disregard for human life. United States v. Chagra, 807 F.2d 398, 402 (5th Cir. 1986), cert. denied, 484 U.S. 832 (1987) (after rejecting the defendant's argument that the jury instruction, which did not demand proof of an intent to kill but only demanded proof of reckless acts causing the death of another, was error, the court noted that the instruction reflected the correct definition of malice); see also, United States v. Harrelson, 766 F.2d 186, 189 n.5 (5th Cir.), cert. denied, 474 U.S. 908 (1985); and United States v. McRae, 593 F.2d 700, 703 (5th Cir.), cert. denied, 444 U.S. 862 (1979). More importantly, this court has specifically found that malice aforethought is equivalent to an intent to do serious bodily injury. Lara v. Parole Comm'n, 990 F.2d 839, 841 (5th Cir. 1993) (explaining the three distinct mental states encompassed in malice aforethought: "(1) intent to kill; (2) intent to do serious bodily injury; and (3) extreme recklessness and wanton disregard for human life" [emphasis added]).

destroy the compatibility existing between the statutes. This court has already acknowledged that the intent element under the federal murder statute is comparable to the intent required under the Louisiana murder statutes. See United States v. Tolliver, 61 F.3d 1189, 1221 (5th Cir. 1995), vacated on other grounds, Sterling v. United States, 116 S. Ct. 900 (1996). In Tolliver, when analyzing a sentencing issue, the court agreed with the district court that the Louisiana second degree statute, under which the defendants were convicted, was most akin to the federal crime of first degree murder.

[T]he language of the guidelines instructs the court to compare the conduct, not the titles of the statutes cited. As pointed out by the district court, different states have different labels for the same crime,

[t]herefore, depending upon which state murder statute is charged as the underlying offense of "premeditated murder or killing with specific intent," inconsistent sentences for identical illegal conduct would be imposed in different states if the base offense level was computed merely by looking at the "label" of such statute and having that label be determinative of the most analogous federal offense, rather than looking at the actual substance of the underlying state statute to determine the most analogous federal offense.

The Tolliver court concluded that the district court had correctly compared the substance of the underlying offense and correctly found that first degree murder was the most analogous federal offense. Though labeled somewhat differently, "intent to inflict serious bodily injury" and "intent to inflict great bodily harm" represent parallel intents for purposes of evaluating these murder statutes. Accordingly, the elements under the federal and Louisiana murder statutes are analogous enough for us to conclude that the two statutes share the same essential elements.

In the present case, the government proved the elements for federal murder at trial. The district judge instructed the jury as follows:

in order to convict either of the defendants of First Degree Murder, you must find:

1. That said defendant killed Jadasha D. Lowery on or about December 20, 1993; and
2. That said defendant acted with specific intent to kill or inflict great bodily harm.

The jury's finding that both Lewises were guilty of this crime indicates that the intent and death elements were satisfied. Accordingly, the elements for second degree murder, which mirror the elements contained in the jury charge, were proven below.

Provided that we find below that the Lewises' convictions are not reversible due to trial error, remand for resentencing is not warranted in this case. Resentencing is only required where the district court has imposed a sentence that exceeded the maximum sentence that the defendant would have received if sentenced under the applicable federal statute. In *Hockenberry*, the court explained that resentencing was necessary because the indictment could not support the ten-year sentence Hockenberry received. 422 F.2d at 174. Though the maximum sentence under the California statute was ten years, the maximum sentence available under the federal statute was only five years. Accordingly, the court instructed the district court on remand to reduce the sentence to comport with the federal penalty.

In *United States v. Hall*, 979 F.2d 320, 323 (3d Cir. 1992), the Third Circuit refused to remand for sentencing because "the sentence imposed on Hall was not higher than that which could have been convicted under the CFR." The CFR provided punishment consisting of a fine not exceeding \$500, or six months imprisonment, or both, plus costs. The district court sentenced Hall to 45 days imprisonment and a fine of \$300. The *Hall* court found no prejudice and no need for remand.

Here, the Lewises did not receive a sentence exceeding the maximum sentence allowed under the federal murder statute. The United States Code makes second degree murder punishable by imprisonment "for any term of years or *for life*." 18 U.S.C. § 1111 (emphasis added). Mr. and Mrs. Lewis both received life sentences. Unlike Hockenberry, the Lewises' sentences are supported by their joint indictment. Therefore, we need not remand for resentencing.

### C. CLAIMS OF TRIAL ERRORS.

Our conclusions regarding the defective, but not fatal, indictment and the appropriate remedy for the flawed assimilation do not end the discussion. We still must determine whether the convictions can stand in the face of the other trial errors alleged by the defendants. After a thorough review of the record, we find no reason to reverse the Lewises' convictions. We will, however, discuss the Lewises' specific contentions of error below.

#### 1. *Sufficiency of the Evidence.*

Both Lewises claim that there was insufficient evidence to prove that they had specific intent to kill or inflict great bodily harm on Jadasha. Mr. Lewis claims that there is overwhelming evidence suggesting that Mrs. Lewis had a plausible motive (i.e., jealousy) to harm Jadasha and that she delivered the murderous blows to Jadasha; whereas, the evidence merely places him on the premises on the day of the murder. Mr. Lewis lists several witnesses who testified as to Mrs. Lewis's jealousy and abuse of Jadasha. Only Mrs. Lewis and her two daughters testified that Mr. Lewis hit Jadasha. Not even they testified that he hit Jadasha on the head. Moreover, the pathologist testified that he had to dissect Jadasha's body to see the extent of the bruising, and that the visible marks cannot be characterized as "great bodily harm."



Similarly, Mrs. Lewis admits to disciplining Jadasha, but denies that the discipline resulted in significant injury. She points primarily to testimony of the pathologist in support of her insufficient evidence claim. He testified that (1) the hemorrhages and bruises on Jadasha's head would not have been visible through her scalp and hair, (2) the deep bruises evident on the pre-autopsy and autopsy photographs of Jadasha were not visible at the time she died and had to work their way to the surface of her skin, (3) the body bruises might not be visible if Jadasha was wearing clothes, (4) there was no evidence that the brain hematomas were directly related to the contusions found on Jadasha's scalp, and (5) the contusions and deep hemorrhages were caused by objects like an adult's hand; one would not expect a fly swatter or 3/8" diameter switch<sup>12</sup> to inflict these injuries. Mrs. Lewis also argues that none of the many witnesses called by the government or the defendants testified that they saw Mrs. Lewis strike Jadasha or use unusual or excessively cruel discipline measures on her. She further asserts that "even though [Jadasha] died, that is not in and of itself murder."

The standard for reviewing the sufficiency of the government's evidence is whether a reasonable trier of fact could have found that the evidence established the appellant's guilt beyond a reasonable doubt. United States v. Stedman, 69 F.3d 737, 739 (5th Cir. 1995); and United States v. Ruggiero, 56 F.3d 647, 654 (5th Cir.), cert. denied, 116 S. Ct. 486 (1995). We must review the evidence in the light favorable to the guilty verdict, that is, in the light most favorable to the government. See United States v. Tannehill, 49 F.3d 1049, 1054 (5th Cir.), cert. denied, 116 S. Ct.

---

<sup>12</sup>A "switch" is a light branch from a tree or bush used to discipline by striking.

167 (1995). Further, we must consider all reasonable inferences arising from the evidence in the light most favorable to the government. Id.

Under Revised Statute 14:30A(5), the government had to prove that the Lewises killed Jadasha with specific intent to kill or inflict great bodily harm upon a victim under the age of twelve. Further, the government had to satisfy its burden of proving that the Lewises were guilty beyond a reasonable doubt; proving only that the Lewises *could be guilty* is insufficient to satisfy this burden. United States v. Sacerio, 952 F.2d 860, 863 (5th Cir. 1992). Because Jadasha's age and death are undisputed, we proceed to the issue of the defendants' intent.

We find that the record fully supports the defendants' convictions. Their arguments ignore the vast amount of circumstantial evidence which was sufficient to allow a jury to infer that they were guilty of murdering Jadasha. In the defendants' statements given contemporaneously with the investigation into Jadasha's death both admitted to beating Jadasha numerous times within the twenty-four hours preceding her death. Mr. Lewis shook Jadasha several times and hit her with his hand or a fly swatter, while Mrs. Lewis hit her with a fly swatter, coat hanger, and switches. Further, because they spent the day together, the Lewises were aware of the beatings administered by the other that day. A military police officer testified that soon after learning that Jadasha was dead Mr. Lewis told the military police officers "I shouldn't have done it; I shouldn't have spanked her like that." Other military police officers testified that Mrs. Lewis made spontaneous statements that "she only had to whip [Jadasha] three times that day" and "she shouldn't have hit the child. If the child would be okay, then she would not punish her again." In addition, both related a version of an incident in which Mr. Lewis was beating Jadasha, she ran in her room or was instructed to go to her room, and then Mrs. Lewis called her from the room, wherein Mr. Lewis beat Jadasha again.



Further, during the ride to the correctional facility Mr. Lewis was overheard asking investigator McCormick how pleading guilty to a charge relating to homicide would affect his military career.

Testimony from a paramedic, emergency personnel, a pediatrician, and a forensic pathologist attested to outward signs that demonstrated the extent of Jadasha's injuries. Testimony indicates that flesh wounds on Jadasha "were still oozing blood" when she arrived in the emergency room. The paramedic describes a mark on Jadasha's forehead, a swollen lip, blood matted in her hair, blood on the top of her left ear, skin missing from her left ear, and marks on her body from a fly swatter or a coat hanger. The injuries on her body were consistent with an adult's open hand, a fly swatter, a hanger, and a curtain rod.

The pediatrician's testimony corroborated the testimony of the paramedic and emergency room personnel. Additionally, he said that Jadasha's abdomen was tense, indicating the possibility of abdominal trauma. The cartilage appeared to be fractured in Jadasha's left ear. Jadasha had suffered multiple repeated trauma to her body. Moreover, the pediatrician agreed that the injuries qualified as "great serious injuries."

Similarly, the forensic pathologist's description of the crime scene showed that the blood of the slaughter remained in the house. Several blood drops appeared all over the floor of the living room and on the floor of Jadasha's room. Blood was found on pieces of a curtain rod found crumpled in the Lewises' garbage can. Dried blood spots were visible on the sofa, on the window curtail, on the closet doors in the hallway, in the master bedroom closet, and on walls. One blood spot on the wall looked like a child's smeared hand print. Blood appeared on articles of clothing and blankets. In addition to the blood spots, the pathologist found several pieces of broken twigs in Jadasha's room, two unusually thick and bulky fly swatters, which he said "didn't look like what you

would think a fly swatter would look like." He also found a clump of hair that appeared to be pulled out of the scalp.

The forensic pathologist counted over two hundred injuries on Jadasha's body caused by non-accidental injury. He matched the shape of Jadasha's injuries with the weapons the Lewises admitted using to beat Jadasha. He also testified regarding the nature of the old and new wounds covering her body. In great detail he described the raw sores, lacerations, and callouses evident on both sides of Jadasha's buttocks, which were caused from chronic, repetitive injuries. The pathologist testified that (with the exception of some areas on the buttocks, the left ear, and scars from a hot liquid burn) the injuries to Jadasha's body were inflicted within twenty-four hours of her death because there was "recent bleeding in the underlying tissue." So much blood was redirected into the tissues underlying the injuries that Jadasha's circulatory system was missing one-third to two-third of the blood normally found in the circulatory system. The pathologist explained that an adult's hand, rather than the twigs, coat hanger, or fly swatter, probably caused the deeper hemorrhages. He said the massive hemorrhaging could have eventually caused Jadasha's death; however, he said Jadasha died from cerebral edema (brain swelling), caused by a blow to her head. The pathologist conservatively counted nine head injuries, any one of which was sufficient to cause Jadasha's death. He said that the amount of force necessary to cause the brain to swell is equivalent to dropping a child on its head from a height higher than three feet onto an uncarpeted floor. Further, the pathologist discussed contusions on Jadasha's forehead, on both cheeks, and over the bridge on her nose as well as scratches and cuts in her face. He also said that several coat hanger type abrasions appeared in Jadasha's face.

Neighbors and friends of the Lewises also attested to the history of abuse to which Jadasha was subjected, primarily by Mrs. Lewis. For example, Amber Nantz, who visited the Lewises testified that she observed injuries on Jadasha on several occasions. When Mrs. Lewis explained in Jadasha's presence how a large black eye occurred, "Jadasha kind of had a funny expression on her fac[e], a funny look on her face that she didn't know what Debra was talking about." Mrs. Nantz also related that Mrs. Lewis withheld food from Jadasha for three days to teach her a lesson, and during that time she would intentionally eat food in front of Jadasha to see if Jadasha would admit to her hunger. Numerous other witnesses corroborated the signs of injury and abuse inflicted on Jadasha. Another person witnessed Jadasha with a black eye. Several attested to seeing the burn on Jadasha's ear and hearing of the three days of starvation. Most indicated that Debra voluntarily spoke of disciplining Jadasha, and they consistently indicated that the Lewises said they disciplined Jadasha by spanking her with their hands or a fly swatter. A few remembered Debra stating that "if she didn't stop whipping Jadasha she would hurt her or kill her" and "she was going to let James whip [Jadasha because] [s]he wasn't going to go to jail for killing that child." One witness testified that when Mrs. Lewis discussed beating Jadasha, her demeanor demonstrated that Mrs. Lewis thought the disciplining was funny. She also said Mrs. Lewis told her Jadasha had sores on her when she came to live with the Lewises and it therefore was necessary to bathe her in bleach. Another witness testified that she saw Mrs. Lewis strike Jadasha and burst her lip. At least one witness reported the starvation incident to the sergeant, and a few suggested to the Lewises that they needed counseling.

After viewing the evidence in favor of the government, we find the record abundant with evidence to prove that the Lewises had specific intent to inflict great bodily harm upon Jadasha and

that they aided and abetted each other in the beatings. There was sufficient evidence regarding the events of the day for the jury to conclude that the Lewises were aware that the other was beating Jadasha and that they assisted each other in some capacity in the beatings. Mr. and Mrs. Lewis both beat Jadasha repeatedly throughout the day of her death. There is no testimony that any other person contributed to the beatings Jadasha endured the day of her death. Without question because of the force accompanying their blows and the numerous beatings administered with that amount of force, the Lewises intended to cause Jadasha serious bodily harm.

The Lewises claim that they could not have known the effect of their blows because the deep bruises did not surface until later. They also say that they could not have seen the bruises through her clothes. We find this reasoning implausible and disingenuous. First, there was blood visible on Jadasha, her clothes, the walls, floors, window curtain, and the instruments used to beat Jadasha. Some of Jadasha's injuries still oozed blood when she reached the emergency room. The jury could infer that a blow from an adult to a forty-two pound four-year-old with enough force to draw blood capable of leaving the trail described above comes with specific intent to inflict great bodily harm.

Second, Jadasha had several old injuries on her body, especially on the cheeks of her buttocks. The Lewises had proof that the force of their blows would produce injury to Jadasha. This proof did not deter their beatings; instead, they administered many more blows of equal or greater force. We find that the Lewises did not have to see the recently created bruises to know that their blows were in fact causing serious internal injuries. Further, testimony revealed that the body blows would have caused Jadasha's death if the head injuries had not killed her. The jury could conclude that non-accidental blows of this quantity and intensity on a forty-two pound four-year-old from an



adult could only come with the specific intent to inflict serious bodily harm on the child.<sup>13</sup> Likewise, the jury could find that blows from an adult to the abdomen of a child of this age and size came with like intent.

Finally, the Lewises struck Jadasha on the head and caused her brain to swell. Testimony from the pathologist clarified the significance of this type of head injury. The jury reasonably could deduce that a non-accidental blow to a four-year-old's head with force greater than a three-foot fall can only come with specific intent to cause serious bodily harm.

We conclude that there was more than enough evidence for a jury to find beyond a reasonable doubt that Mr. and Mrs. Lewis possessed specific intent to inflict great bodily harm on Jadasha. We reject the Lewises' arguments that the evidence was insufficient; the evidence here allows more than an inference that the defendants beat Jadasha mercilessly and repeatedly throughout the day on her head and body, using far more force that would be acceptable to discipline a four-year-old child. Thus, the Lewises' convictions for first degree murder under Louisiana law could not be reversed on this ground.

## 2. *Admissibility of the Photographs.*

The Lewises argue that the prejudicial effect of the photographs outweighed their probative value. Additionally, Mr. Lewis asserts that the autopsy photos, which were unusually gruesome and inflammatory, were unfair because the dissections depicted the extent of the bruising, which he could not have known prior to the autopsy.

---

<sup>13</sup>We are convinced that the Lewises would not have sought medical treatment and would have treated the body bruises themselves with bleach and peroxide as they had treated Jadasha's injuries in the past.

We review the admissibility of photographic evidence for abuse of discretion. United States v. Follin, 979 F.2d 369, 375 (5th Cir. 1992). We find that the district court properly weighed the probative value against the prejudicial effect when evaluating the admissibility of the photographs. See Fed. R. Evid. 403. The court found the photos relevant to the issue of the defendants' intent and the issue regarding absence of accident. We agree that the photos are relevant for these reasons. Gruesome photographs are relevant when they establish an element of the crime charged. United States v. Bowers, 660 F.2d 527 (5th Cir. Unit B Sept. 1981); United States v. McRae, 593 F.2d 700, 707 (5th Cir.), cert. denied, 444 U.S. 862 (1979); and United States v. Kaiser, 545 F.2d 467, 476 (5th Cir. 1977). We also agree with the government that under the facts of this case the photos were relevant to counter claims that the Lewises' employed normal disciplinary measures. The extensive bruising divulges the excessive force behind the Lewises' supposedly disciplinary blows. The photos are the best means of conveying to the jury the force behind the blows.

Further, we find that the potential prejudice was consciously minimized here. The district court avoided duplication and limited the prejudicial effect of the photos by requiring the government to reduce the number of photos to be shown to the jury. Of the approximately 130 photos, the government entered only 16 into evidence. In another child abuse case resulting in death, we commented that the photos of the child's lacerated heart

had the potential to inflame the jury, but we consider it no more inflammatory than photographs that portray this sort of death suffered by the victim in this or any other case where the circumstances of the death are at issue. United States v. Kaiser, 545 F.2d 467, 476 (5th Cir. 1977). The photograph, here, was essential to the government's case if it was to meet its burden of showing that appellant brought cruel and excessive physical force to bear on her child.



Bowers, 660 F.2d at 529. Thus, the district court acted well within its discretion when allowing the government to present the photos to the jury.

### 3. *Admissibility of the Lewises' Statements.*

The Lewises argue that the district court erred by overruling their objections to the adequacy of the advice of rights given to them when they gave statements to investigators. Mr. Lewis asserts that he was not informed that he had a right to a private attorney. Mrs. Lewis claims that she was not advised of her rights until six hours after her initial detention at the hospital, that because of her emotional state she could not comprehend the severity of the situation, that the length of time to give the statement demonstrates the presence of coercion, that she believed the statement had to be given before she could see her son and Jadasha's body, and that she failed to understand the warnings given.

The Supreme Court in United States v. Miranda, 384 U.S. 436, 479 (1966) established the warnings that a defendant must receive in order for his statement to be admissible at trial. The defendant is free to waive the rights conveyed in the warnings if the waiver is done (1) voluntarily and (2) knowingly and intelligently. United States v. Andrews, 22 F.3d 1328, 1337 (5th Cir.), cert. denied, 115 S. Ct. 346 (1994).

In the present case, the district court held a suppression hearing wherein he heard live testimony from investigators and Mrs. Lewis regarding the warnings given to the defendants. The testimony indicates that the Lewises each received a form containing the customary Miranda warnings. The district court found that the military form given to Mr. Lewis adequately apprised him of his rights and allowed him to knowingly waive his rights. Mrs. Lewis received the FBI Miranda warnings form, which she initialed. Additionally, the district court questioned Mrs. Lewis

regarding her statements.<sup>14</sup> The court concluded that Mrs. Lewis understood that she was waiving her rights and voluntarily waived the rights after being adequately advised by an investigator. The district court admitted the statements into evidence after making these determinations.

The district court saw the live testimony and was in a position to factor body language into its credibility determinations. Accordingly, with the exception of the voluntary issue, we must accept the district court's factual findings regarding the interrogations unless the findings are clearly erroneous. United States v. Foy, 28 F.3d 464, 474 (5th Cir.), cert. denied, 115 S. Ct. 610 (1994). We cannot say that these findings are clearly erroneous based upon the record before us.

The issue of voluntariness is a legal question subject to de novo review. Andrews, 22 F.3d at 1340 n.12. A waiver is voluntary when it is "the product of a free and deliberate choice rather than intimidation, coercion, or deception." Id. at 1337. Nothing in the record demonstrates that the Lewises waived their rights because of intimidation, coercion, or deception. We cannot say that the district court erred in denying the Lewises' motions to suppress their statements.

### 4. *The Battered Woman's Syndrome Defense.*

Mrs. Lewis argues that she suffered from Battered Women's Syndrome which diminished her capacity to develop specific intent to kill or inflict great bodily harm on Jadasha or to aid and abet Mr. Lewis to do the same. We concluded above that the government presented sufficient evidence to allow the jury to find that Mrs. Lewis had specific intent to inflict great bodily harm on

---

<sup>14</sup>Mrs. Lewis actually gave two statements. Mrs. Lewis asked to give a second statement so that she could correct inaccurate statements made in the first statement.

Jadasha. The jury heard and evaluated the testimony regarding Battered Women's Syndrome. The jury chose not to believe that the Syndrome affected her ability to develop the intent necessary to commit murder. We find no basis in the record to disturb the jury's credibility choices. See *United States v. Garcia*, 86 F.3d 394, 398 (5th Cir. 1996) (noting that the appellate court must accept the credibility choices supporting the verdict); and *United States v. Straach*, 987 F.2d 232, 237 (5th Cir. 1993) (noting that the appellate court cannot weigh and assess the credibility of the witnesses).

Based on our evaluations of the record, we find no merit to any of the Lewises' evidentiary claims of error. Therefore, we will not compel the government to waste time and resources reindicting the Lewises, duplicating the trial, presenting the same sufficient evidence, and proving the same elements where the jury has already spoken loudly, clearly, and correctly. The jury found the Lewises guilty and, under the circumstances of this case, a new trial would not change this.

#### CONCLUSION

For the foregoing reasons, we AFFIRM the convictions and sentences of James M. Lewis and Debra Faye Lewis for murder of Jadasha D. Lowery even though the indictment erroneously charged them with first degree murder under La. Rev. Stat. § 14:30A(5) pursuant to the Assimilative Crimes Act rather than 18 U.S.C. § 1111.

#### **APPENDIX B**



IN THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

No. 95-30860

UNITED STATES OF AMERICA

Plaintiff - Appellee

DEBRA FAYE

Defendant - Appellant

U.S. COURT OF APPEALS  
**FILED**

SEP 16 1996

CHARLES R. FULBRUGE III  
CLERK

Appeal from the United States District Court for the  
Western District of Louisiana, Lake Charles

ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

(Opinion , 5 Cir., F.3d )  
( September 16, 1996 )

Before JOLLY, DUHE' and STEWART, Circuit Judges.

PER CURIAM:

( ✓ ) The Petition for Rehearing is DENIED and no member of this panel nor judge in regular active service on the court having requested that the court be polled on Rehearing En Banc, (FRAP and Local Rule 35) the Suggestion for Rehearing En Banc is also DENIED.

( ) The Petition for Rehearing is DENIED and the court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service not having voted in favor, (FRAP and Local Rule 35) the Suggestion for Rehearing En Banc is also DENIED.

( ) A member of the court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor, Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

CLERK'S NOTE:

SEE FRAP AND LOCAL  
RULES 41 FOR STAY OF THE  
MANDATE.

BEST AVAILABLE COPY

APPENDIX C



UNITED STATES DISTRICT COURT  
Western District of Louisiana

AUG 22 1995

ROBERT H. SHENWELL, CLERK  
BY [Signature] DEPUTY

UNITED STATES OF AMERICA

v.

Case Number CR 94-20001-02

DEBRA FAYE LEWIS  
Defendant.

**JUDGMENT IN A CRIMINAL CASE**  
(For Offenses Committed On or After November 1, 1987)

The defendant, DEBRA FAYE LEWIS, was represented by Frank Granger.

The defendant was found guilty on count(s) I of a one count indictment after a plea of not guilty. Accordingly, the defendant is adjudged guilty of such count(s), involving the following offense(s):

Title & Section	Nature of Offense	Date Offense Concluded	Count Number(s)
18 USC 7,13 &2 LA. R.S. 14:30(A)(5)	First Degree Murder	12/20/93	1

As pronounced on August 22, 1995, the defendant is sentenced as provided in pages 2 through 4 of this Judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

It is ordered that the defendant shall pay to the United States a special assessment of \$ 50.00, for count(s) I, which shall be due immediately.

It is further ordered that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this Judgment are fully paid.

Signed this the 22<sup>nd</sup> day of August, 1995.

[Signature]  
United States District Judge

Defendant's SSAN: 470-84-6936  
Defendant's Date of Birth: 02/07/61  
Defendant's address: 1400 East Ninth Avenue; Florala, AL

JUDGEMENT ENTERED August 23, 1995  
BY [Signature]  
COPY TO Reginald Granger  
Financial  
USA (collection)

COPY SENT  
DATE 8-22-95  
BY [Signature]  
TO: USM-HC3  
USM SP1  
USP. 3  
BoP 1  
Sent Rep 1  
St. Unit 1

Defendant: DEBRA FAYE LEWIS  
Case Number: CR 94-20001-02

**IMPRISONMENT**

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of the defendant's life.

The defendant is to be given credit for time served.

The court recommends that the defendant be incarcerated at a facility that satisfies the Bureau of Prison's security recommendations, nearest to Pensacola, Florida.

The defendant is remanded to the custody of the United States Marshal.

**RETURN**

I have executed this Judgment as follows:

Defendant delivered on \_\_\_\_\_ to \_\_\_\_\_  
at \_\_\_\_\_, with a certified copy of this Judgment.

United States Marshal

By \_\_\_\_\_  
Deputy Marshal

122

Defendant: DEBRA FAYE LEWIS  
Case Number: CR 94-20001-02

**SUPERVISED RELEASE**

Upon release from imprisonment, the defendant shall be on supervised release for a term of 5 years.

While on supervised release, the defendant shall not commit another federal, state, or local crime; shall not illegally possess a controlled substance; shall comply with the standard conditions that have been adopted by this court (set forth below); and shall comply with the following additional conditions:

1. Report in person to the probation office as directed.
2. The defendant shall not own or possess a firearm, destructive device, or illegal substance.
3. The defendant shall participate in substance abuse and/or mental health counseling/treatment as directed by the U.S. Probation to include urinalysis, at the defendant's cost.
4. The defendant shall maintain employment and shall perform a minimum of 200 hours of community service during the first 24 hours of supervised release. While not employed, the defendant shall perform 40 hours of community service per week as directed by Probation.

**STANDARD CONDITIONS OF SUPERVISION**

While the defendant is on supervised release pursuant to this Judgment:

- 1) The defendant shall not leave the judicial district without the permission of the court or probation officer.
- 2) The defendant shall report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete written report within the first five days of each month.
- 3) The defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer.
- 4) The defendant shall support his or her dependents and meet other family responsibilities.
- 5) The defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons.
- 6) The defendant shall notify the probation officer within seventy-two hours of any change in residence or employment.
- 7) The defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute or administer any narcotic or other controlled substance, or any paraphernalia related to such substances.
- 8) The defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered.
- 9) The defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer.
- 10) The defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer.
- 11) The defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer.
- 12) The defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court.
- 13) As directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

Defendant: DEBRA FAYE LEWIS  
Case Number: CR 94-20001-02

**STATEMENT OF REASONS**

The court adopts the factual findings and guideline application in the presentence report except as noted in the attached Memorandum Ruling.

**Guideline Range Determined by the Court:**

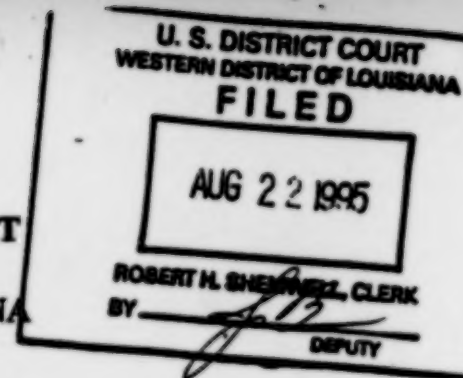
Total Offense Level:	45
Criminal History Category:	I
Imprisonment Range:	life
Supervised Release Range:	3 to 5 years
Fine Range:	\$ 25,000 to \$ 1,000,000
Restitution:	\$ n/a

The fine is waived or is below the guideline range because of the defendant's inability to pay.

The sentence is within the guideline range, that range exceeds 24 months, and the sentence imposed for the following reasons: Severity of offense.



UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF LOUISIANA  
LAKE CHARLES DIVISION



UNITED STATES OF AMERICA : DOCKET NO. 94-20002-02  
VS. : JUDGE TRIMBLE  
DEBRA FAYE LEWIS : MAGISTRATE JUDGE WILSON

MEMORANDUM RULING

Presently before the court are the defendant's, Debra Faye Lewis's, objections to the presentence report which was prepared by the Probation Department.

In the first, second, and fourth objections the defendant objects to certain factual information which was contained in the presentence report, particularly the categorization of trial testimony. This court presided over the trial of this defendant and is very familiar with the testimony brought forth. The Presentence Report ("PSR") generally bears sufficient indicia of reliability to be considered as evidence by the court in resolving factual disputes. *U.S. v. Valencia*, 44 F.3d 269 (5th Cir.(La.) Jan 26, 1995)(No. 94-40063). It is proper for the district court to rely upon the PSR's construction of evidence to resolve a factual dispute, rather than relying on the defendant's version of the facts. *U.S. v. Montoya-Ortiz*, 7 F.3d 1171 (5th Cir.(Tex.) Nov. 12, 1993)(No. 92-8204), citing *U.S. v. Robins*, 978 F.2d 881, 889 (5th Cir. (Tex.) Nov. 20, 1992)(No. 91-1850). Thus, the court, based upon its own recollection as well as the facts recited in the PSR, specifically adopts the facts as stated therein.

The third objection concerns the assignment of two additional points for a vulnerable victim. The defendant argues that such a victim related adjustment, U.S.S.G. §3A1.1, is inappropriate

because the Louisiana statute under which the defendants were charged required the victim to be under 12 years of age. The defendant is correct that a condition that occurs as a necessary prerequisite to the commission of a crime cannot constitute an enhancing factor under the "vulnerable victim" enhancement provision of the sentencing guidelines; the vulnerability of that provision must be "unusual" vulnerability which is present only in some victims of that type of crime. *U.S. v. Moree*, 897 F.2d 1329 (5th Cir. (Miss.) March 29, 1990)(No. 89-4204); U.S.S.G. § 3A1.1; *U.S. v. Rowe*, 999 F.2d 14 (1st Cir. (Mass.) Jul 22, 1993)(No. 92-1959)(must show individual circumstances); *U.S. v. Morrill*, 984 F.2d 1136 (11th Cir. (Ga.) Feb 16, 1993)(No. 91-8386)(victim must possess unique characteristics which make him or her more vulnerable or susceptible); *U.S. v. Davis*, 967 F.2d 516 (11th Cir. (Ala.) Aug 3, 1992)(No. 90-7108) (circumstance, as well as immutable characteristics, can render a victim unusually vulnerable). In *U.S. v. Peters*, 962 F.2d 1410, 1417 (9th Cir. (Cal.) Feb 7, 1992)(No. 91-50097, 91-50133), the court held that "vulnerability" includes not just age, but other characteristic of the victim, including the victim's reaction to the criminal conduct and the circumstances surrounding the act.

In the case at bar, to be prosecuted under the Louisiana state law, the victim had to be under age twelve. The vulnerability component of the Sentencing Guideline, however, incorporates more than mere age. This court agrees with Probation that the victim in this case was certainly vulnerable. The facts of the case show that the victim was left in the control of a step-mother who obviously was not fond of the little girl. Because the victim's father was in the military, the child was removed from other family members who may have noticed the signs of abuse, particularly the grandmother who was particularly close to the little girl. The pattern of abuse was repeated and the child had no way of escape. She was trapped in a situation with two people who she should have been able to trust, yet who systematic beat her to death. The defendant's own statement, although not produced in its

entirety for the jury, indicated that she called the child out of her room repeatedly the night of her death so that her father could beat her. If any victim is "vulnerable" it was the four year old victim in this case. The defendant's objection is OVERRULED.

Lake Charles, Louisiana, this 22<sup>nd</sup> day of August, 1995.

James Trimble, Jr.  
JAMES T. TRIMBLE, JR.  
UNITED STATES DISTRICT COURT

COPY SENT  
DATE 8-22-95  
BY JB  
TO: Attached to Judgment

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF LOUISIANA  
LAKE CHARLES DIVISION

AUGUST 22, 1995  
Date

PRESENT: JAMES T. TRIMBLE, JR., Judge Presiding  
JOE WILLIAMS, Court Reporter  
JO ANN BENOIT, Minute Clerk

COURT OPENED: 10:00 A.M. COURT ADJOURNED: 10:30 A.M.

MINUTES OF COURT

CASE NO. CR94-20001-02  
DEFENDANT: DEBRA FAYE LEWIS  
GOVT. COUNSEL: MICHAEL SKINNER AND LARRY J. REGAN  
DEFENSE COUNSEL: FRANK GRANGER

COPY SENT  
DATE 8-22-95  
BY JB  
TO: Regan  
Granger  
Hudson

X Case is called for sentencing.  
Objections to the presentence report are ruled on by Written Memorandum Ruling.  
In determining the particular sentence to be imposed, the court has considered the factors contained in 18 U.S.C. 3553.

Pursuant to the sentencing Reform Act of 1984, it is the judgment of the court that the defendant, DEBRA FAYE LEWIS, is hereby committed to the custody of the Bureau of Prisons to be imprisoned for life on count I of the indictment. The defendant is to be given credit for time served.

Upon release from imprisonment, the defendant shall be placed on supervised release for a term of five (5) years. While on supervised release, the defendant shall not commit another federal, state or local crime; shall not illegally possess a controlled substance; shall comply with the standard conditions that have been adopted by this court and shall comply with the following additional conditions:

- 1) Report in person to the probation office as directed.
- 2) Shall not possess a firearm, destructive device, or illegal substance.
- 3) Shall participate in substance abuse treatment and /or mental health counseling/treatment as directed by the U.S. Probation Office to include urinalysis, at the defendant's cost.
- 4) Shall maintain employment and shall perform a minimum of 200 hours of community service during the first 24 months of supervised release. While not employed, the defendant shall perform forty hours of community service per week as directed by Probation.

Upon beginning supervised release, the Probation Department shall supply the defendant with a written statement that sets forth the conditions to which the term of supervised release is subject, and that is sufficiently clear and specific to serve as a guide for the defendant's conduct and for such supervision as is required.

The court finds that the defendant does not have the ability to pay a fine.

The defendant is to pay the standard assessment of \$50.00 on count I to the Crime Victim Fund immediately.

The defendant is advised by the court of her right to appeal. The defendant is remanded to the custody of the U.S. Marshal to begin service of this sentence. The court recommends incarceration at a facility that meets the Bureau of Prison's security requirements that is nearest to Pensacola, Florida.